



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Enviromediation Services, LLC

File: B-280643

Date: November 2, 1998

D. Lee Roberts, Jr., Esq., Long, Weinberg, Ansley & Wheeler, for the protester.
Kimberly A. Kegowicz, Esq., Department of Transportation, for the agency.
Wm. David Hasfurthur, Esq., and Michael R. Golden, Esq., Office of the General
Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where solicitation amendment deleted one item of work, a deletion which had no effect on the price or the quality of the work required, bidder's bid was improperly rejected as nonresponsive for the failure to acknowledge receipt of the amendment.

DECISION

Enviromediation Services, LLC protests the rejection of its bid under invitation for bids (IFB) No. DTG83-98-B-3WF199, issued by the United States Coast Guard for demolition of two housing units and construction of a parking lot. Enviromediation's bid was rejected as nonresponsive because the firm did not acknowledge in its bid the receipt of an amendment which deleted one item of work. Enviromediation argues that since the price it bid for the deleted work can simply be deducted from its total bid price, it should receive the award based upon its low total bid price for the work under the amended IFB.

We sustain the protest.

The IFB required bidders to submit prices for a basic bid and three unit bid items. IFB § B, at 3. Under the basic bid, bidders were to submit one price for the removal and disposal of all indicated asbestos-containing materials in the two housing units prior to general demolition of the units, for procuring an independent sampling and testing company to perform testing for lead-based paint materials prior to general demolition of the units, for the demolition of the units and disposal of all demolition debris as normal construction debris, and for the removal and disposal of housing unit concrete slabs and footings, timber piles and utility lines. Under unit bid item 001, bidders were to submit a price for the additional cost of disposing of demolition debris if it consisted of lead-based paint materials. Unit bid item 002 required a price for the disposal of the concrete entrance drive and other miscellaneous site features and the construction of a new asphalt concrete parking area and court area. Unit bid item 003 required a price for the removal/disposal of

the buried water supply or sanitary sewer piping of the two units, treating these as asbestos-containing material. Id. Prior to bid opening, in response to a request for information from a potential bidder pointing out that unit bid item 001 did not specify any "quantifiable data" regarding the lead-based paint debris or identify in the specifications "allowable method(s) of disposal," the IFB was amended to delete unit bid item 001, and a revised schedule was attached. Request For Information from J.L. Young Enters., Inc., June 5, 1998; IFB amend. 0001, § B, at 3.

Eight bids were opened on June 25, 1998. Total prices, apart from the Enviromediation bid, ranged from \$142,990 to \$230,817.97. Abstract of Offers-Construction. The government estimate for the work, as amended, was \$164,988. Id. at 1. Enviromediation submitted prices for all four items with a total price of \$178,324. Enviromediation Bid at 1. It did not acknowledge in its bid the receipt of the amendment deleting unit bid item 001--pricing the disposal of lead-based paint debris, if required. Enviromediation submitted the original schedule and priced the lead-based paint debris disposal at \$75,373. Id. at 3. If \$75,373 was deleted from Enviromediation's bid, Enviromediation would be the low bidder with a total price of \$102,951. Abstract of Offers-Construction; Enviromediation's Bid at 1. After the Coast Guard rejected the Enviromediation bid as nonresponsive due to the failure to acknowledge the amendment, award was made to the low, responsive bidder. Contracting Officer's Summary of Facts at 2.

The agency argues that the deleted unit bid item 001 lacked sufficient information to permit the computation of an intelligent bid price, and therefore the amendment correcting the deficiency was material. Accordingly, the agency asserts that Federal Acquisition Regulation (FAR) § 14.405(d), which permits the failure to acknowledge an amendment to be waived if the amendment involves only a matter of form or has either no effect or merely a negligible effect on price, quantity, quality, or delivery, is inapplicable here. Memorandum of Law at 2-4. The agency notes that one bidder submitted in essence two bids: one with prices for all four of the original items and one for the three items remaining in the amended IFB. (The agency submitted this bidder's bids and two other bidders' similar bids subsequent to its submission of the agency report.) The total price received for the three items on the amended bid schedule was greater than for the same three items on the unamended bid schedule. This discrepancy shows, the agency argues, how the work involved in unit bid item 001 could affect the prices bid on the other items and why it was imperative that prices based upon the amended IFB be submitted so that the low bidder could be determined with certainty. Further, the agency argues that had Enviromediation's bid not been rejected as nonresponsive, that bidder would have been in the position of unilaterally deciding whether it would or would not accept the award by determining which interpretation of its prices would be adopted. Id. at 4.

Enviromediation contends that the mistake it made is simply a minor informality which may properly be corrected by deducting its bid price for the deleted item from its aggregate bid price. It argues that the deletion of the item had no effect on its other bid prices since they would have stood on their own in view of the IFB provision that states that the item(s) "WILL BE AWARDED BY MODIFICATION WHEN AND IF REQUIRED." (This provision also states that "THE PRICE(S) WILL REMAIN IN EFFECT FOR THE DURATION OF THE CONTRACT.") IFB § B, at 4; Protest, July 23, 1998, at 4.

FAR § 14.405 provides that a contracting officer shall give a bidder an opportunity to cure a deficiency resulting from a minor informality or irregularity in its bid including the failure to acknowledge an amendment which has no, or merely a negligible, effect on such factors as the price or the quality of the item being acquired; in the alternative, the contracting officer may waive such a minor informality or irregularity. There is no precise rule for determining whether a change in requirements is more than negligible, Innovative Refrigeration Concepts, B-271072, June 12, 1996, 96-1 CPD ¶ 277 at 2; rather, that determination is based on the facts of each case. Day and Night Janitorial and Maid and Other Servs., Inc., B-240881, Jan. 2, 1991, 91-1 CPD ¶ 1 at 4. The mere fact that requirements have been changed by an amendment does not render the amendment material and does not, therefore, provide a basis for rejecting a bid that does not acknowledge the amendment. See L & R Rail Serv., B-256341, June 10, 1994, 94-1 CPD ¶ 356 at 5-6 (protest sustained where the agency did not provide support for its assertion that a change in requirements was material). In other words, in cases where the record does not establish that price is meaningfully affected by an amendment, for the amendment to be material something about the change must reflect a legitimate need of the agency such that its requirements will not be met if the contractor performs to the unamended specifications. See Doty Bros. Equip. Co., B-274634, Dec. 19, 1996, 96-2 CPD ¶ 234 at 4 (rejection of an offer for failure to acknowledge an amendment which relaxed a solicitation requirement is improper).

We do not believe that the agency has established the materiality of the amendment, and we therefore conclude that the agency acted improperly in not permitting a waiver of Enviromediation's failure to acknowledge the amendment. First, there is no reason for the requirement found in unit bid item 001 to have any effect on any of the other bid items. It concerned simply any additional disposal costs that would be incurred for lead-based paint debris, and it is, as such, a distinct and separate requirement from all the other bid items. The agency states that if lead paint is discovered, it would be treated as a changed condition and disposal costs would be subject to an equitable adjustment. Memorandum of Law at 3. Thus, the deletion of unit bid item 001 should have had no impact on the basic bid. Second, contrary to the agency's position, the bids of the three firms which bid on both the original four items and on the amended three items do not establish that the deleted item affected the other line items. One bidder (EME, Inc.), in addition to deducting its price for the deleted item from its total price, increased its prices for two, and

decreased its price for one, of the remaining three items with the result that its new total price was slightly lower than if it had simply deducted its second item price from its original total price. Again, the increased prices for the items requiring disposal of concrete and other site features and new construction and requiring disposal of water supply/sanitary sewer piping do not appear to have anything to do with disposing of lead-based paint debris. The two other bidders that submitted separate original and amended bids increased their prices (on the amended bids) for some of the remaining three items, so that their amended prices for those three items were higher than their total prices for all four items on the original bid schedule. See Bids of Asbestos Inspections, Inc. and Multi-State Contracting Corporation. The fact that, after receiving the amendment deleting unit bid item 001, the bidders revised their bids for other items as identified above does not establish that the revisions were caused by the amendment. There is no indication that the price revisions were related to the amendment, nor is there any reason that they should have been.

In view of our conclusion, we recommend that the agency waive Enviromediation's failure to acknowledge the amendment and make award to Enviromediation, if otherwise appropriate, for all items other than the deleted item after terminating the award it made to the second low bidder. Finally, we recommend that Enviromediation be reimbursed the reasonable costs of filing and pursuing the protest. The protester should submit its claim for cost, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days after receipt of this decision. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1), (f)(1) (1998).

The protest is sustained.

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